

1999

## State of Utah v. Brett Larsen : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH,

APPELLEE,

v.

BRETT LARSEN,

APPELLANT.

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:  
:

PRIORITY NO. 2  
(defendant is incarcerated)

Case No. 990265-CA

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REPLY BRIEF OF APPELLANT

This is an appeal from convictions for negligent homicide, a class A misdemeanor, for possession of alcohol by a minor, a class B misdemeanor, open container, a class C misdemeanor, and failure to yield, a class C misdemeanor, entered in the Third District Court in and for Salt Lake County, Murray Department, the Honorable Michael K. Burton, Judge, presiding.

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**FILED**

Utah Court of Appeals

NOV 24 1999

Julia D'Alesandro  
Clerk of the Court

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REPLY TO STATE'S VERSION OF FACTS

The following factual allegations by the State require correction or clarification.

The State claims that “[a]ll occupants in King’s car were wearing seatbelts. (T. 116-7).” State’s brief at 3.

Pages 116 and 117 of the transcript are King’s testimony that his car had automatic shoulder belts which come up and manual lap belts, and that at the time of the collision, Kara Skinners-Little was at least wearing the automatic shoulder belt (T. 116-117).

The State claims that “[a]bout 200 yards from the intersection at 3800 South and Wasatch Blvd., King changed lanes to avoid a car which had slowed to make a turn. (T. 113-114).” State’s brief at 3.

There was no testimony that the car that King passed was slowing to make a left-hand turn. Pages 113 and 114 of the transcript are King’s testimony that he moved into

the right lane to pass a slower moving car in front of his in the left lane, and that he did not recall if there was anyone who was in the left turn lane (T. 113-114).

The State claims that King was driving at a rate of 40 to 45 miles an hour at the time of the collision, State's brief at 3 citing T. 113, 115, claims that the eyewitness, J. Henry Larsen, testified that King's speed was "normal for Wasatch Boulevard," State's brief at 4, citing T. 71-72, and later claims that "King's Subaru was traveling at a reasonable speed immediately prior to the collision" State's brief at 10.

King testified that he could only estimate his speed at 40 to 45 miles an hour (T. 114-115), and that prior to moving into the right hand lane to pass the slower moving car, he shifted into fifth gear, which he normally did at around 40 miles an hour (T. 133-114). J. Henry Larsen did testify in accordance with the State's representations, but also confirmed his indication in the police report that King's Subaru was traveling at 45 to 55 miles an hour (T. 71-72).<sup>1</sup> As the State conceded on page 6 of its brief, the speed limit on Wasatch Boulevard was 40 miles an hour (T. 21).

The State claims that Larsen did not use his turn signal. State's brief at 4, citing T. 58-59 and 115. J. Henry Larsen could not recall if Larsen's turn signal was on (T. 58-

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<sup>1</sup> The State's accident reconstructionist was unable to determine the speed of the Subaru because of insufficient data (T. 91).

Larsen's motion for a remand pursuant to Utah Rule of Appellate Procedure 23B and accompanying affidavit allege that Larsen's mother provided trial counsel with evidence that the combined speed of the cars involved in the accident was between 110 and 120 miles an hour.

Larsen agrees with the State that the affidavit referred to here and in footnote 1 of his opening brief is not part of the trial court record for purposes of this appeal, and brings it to the Court's attention in renewing his motion for a 23B remand.

59), and King testified that he only saw Larsen's truck for a split second prior to the collision and that either Larsen's signal was off, or was between blinks when King saw the truck (T. 115).

## ARGUMENT

### I LARSEN HAS FULFILLED HIS OBLIGATION TO MARSHAL THE EVIDENCE.

The State argues that this Court should abstain from reaching Larsen's claim of insufficiency of the evidence on the negligent homicide conviction and on the failure to yield conviction, because Larsen failed to properly marshal the evidence. State's brief at 6-12.

As noted at pages 1 through 3 in Larsen's opening brief, the marshaling requirement applies when an appellant seeks to challenge a trial court's factual findings, and really does not apply in this case, wherein it is the trial court's legal, as opposed to factual, analysis which is primarily at issue.

Out of an abundance of caution, however, Larsen did marshal the evidence which supported the specific findings of the trial court with regard to both the negligent homicide and negligent collision convictions. See Larsen's opening brief at 10-13, 24-26.

Without citing to the record, the State lists sixteen factual allegations which Larsen supposedly failed to mention in marshaling the evidence on the negligent homicide count. The State complains,



Specifically, Appellant fails to apprise the Court that (1) on June 28, 1998, Appellant was 19 years old; (2) that following the collision which resulted in the death of Kara Skinners-Little, a collision to which Appellant was a party, an open container of Canadian Host Whiskey was found in Appellant's truck; (3) that Appellant's blood tested positive for the presence of alcohol and that the trial court made a specific finding that Appellant had consumed alcohol on that occasion; (4) that J. Henry Larsen, from his position directly behind Appellant, observed the oncoming car of Douglas King from 50-75 yards away, enough distance that as Appellant made his turn into the oncoming car, Larsen knew that a collision was inevitable, honked his horn in warning, and then instructed his passenger to dial 911, all before the fatal collision took place; (5) that the collision occurred at approximately 9:00 p.m., and although it was not yet completely dark outside, it was dusk; (6) that neither King nor Larsen believed Appellant's headlights were illuminated; (7) that neither King nor Larsen saw a left turn signal operating on Appellant's vehicle; (8) that Deputy Johnson tested Appellant's left turn signal lamp and concluded that either the turn signal was not on at all or was between blinks at the time of the collision. In addition, the undisputed evidence at trial was that: (9) Douglas King had not been drinking or using any drugs on the date of the fatal collision; (10) that he had driven that route in that car on hundreds of occasions and was intimately familiar with both the intersection and the vehicle; (11) that both of his hands were on the steering wheel; (12) that he was paying attention and although he may have been "mildly distracted" by conversation, any such distraction did not cause him to take his eyes off the road; (13) that King's Subaru was traveling at a reasonable speed immediately prior to the collision; (14) that King had no time to take evasive action or brake prior to the collision; (15) that King was injured in the crash but did not lose consciousness; (16) that Skinners-Little was wearing a seatbelt at the time of the crash.

State's brief at 9-10.

Larsen had no obligation to marshal evidence in support of the State's list of sixteen factors, many of which Judge Burton never discussed when he ruled, and many of which are irrelevant to or entirely unnecessary to the conviction. Judge Burton's ruling was as follows:

And obviously, the question upon which the whole case is focused and which is the most serious, of course, is the negligent homicide. A factor on that matter is, I think important to note, that Mr. J. Larsen notes that as the light turned green for Mr. Brett Larsen, that he waited a few moments, then he moved into the intersection. Mr. J. Larsen describes the turn as not being slow and not being fast, just a casual, normal turn, and I took it to mean that Mr. Brett Larsen was turning as if it were a clear intersection.

Mr. J. Larsen, sitting behind Mr. Brett Larsen, can see the other motor vehicle approaching the intersection, so it's clear that the vehicle was visible. And finally, Deputy Stratford tells us that Mr. Brett Larsen's truck tire was moving at the time of the impact, indicating that he made no effort to stop.

Now, with those findings of fact, then we come to the standard that must be applied, which both sides have recited. Should Mr. Brett Larsen have been aware of a substantial and unjustifiable risk that he was taking or which might occur when he took that risk? And was this risk of such a nature and degree that his failure to perceive it constituted a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from Mr. Brett Larsen's standpoint?

And I have to say, though it's been ably argued and the facts presented, it's clear to me that this is a gross deviation from the standard of care that an ordinary person has to exercise. Were that not true, it would not be possible to drive a motor vehicle on any roadway that ever intersected with another roadway.

I mean, Mr. Brett Larsen's actions today, due to these facts, has to be a gross deviation. Essentially, he drove into the intersection, turned left, and made no perceptive view of the oncoming traffic. And if one were to do that, and it would just be a simple deviation or to be the normal procedure, it could not be tolerated in any way. So on the count criminal -- negligent homicide, I find the Defendant guilty based on the facts presented.

(T. 138-139).<sup>2</sup>

While Larsen did support his own position that Larsen may not have seen King's

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<sup>2</sup> Judge Burton did make findings regarding Larsen's possession and consumption of alcohol, but these findings were directed at the charges of and convictions for open container and possession of alcohol by a minor (T. 137-138, in the addendum to Larsen's opening brief).

Subaru prior to the collision because immediately prior to the collision, King's Subaru pulled out from behind another car in the left-hand lane to pass it on the right just as King approached the intersection and the crest of a hill, this did not violate the marshaling requirement, because Larsen did cite to all the evidence and inferences which might be drawn to support the trial court's position, see Larsen's opening brief at 11-13, and then proceeded to demonstrate why, as a matter of law, the evidence did not sustain the conviction, see Larsen's opening brief at 13-20. This comported with the marshaling requirement. See e.g. Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896, 899 (Utah 1989).

Larsen has been complete and accurate in stating the facts, Larsen's opening brief at 6-9, and in marshaling the evidence, Larsen's opening brief at 10-13 and 26. Particularly where his arguments go to the trial court's legal errors, as opposed to factual findings, this Court should address the merits of the issues.

## II. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE NEGLIGENT HOMICIDE CONVICTION.

### A. Proximate Cause

The State implies claims that Larsen has failed to apprise the Court of the stipulation of the parties at trial that Kara Skinners-Little died as a result of the collision with Larsen's truck. State's brief at 12-13.

Larsen cited to page 105 of the transcript, wherein the stipulation appears, in his

very first statement of fact, “On June 28, 1998, Kara Skinners-Little died as a result of injuries sustained in an automobile accident involving the car Mr. Larsen was driving and the car being driven by Douglas King (T. 24, 105).” Larsen’s opening brief at 6.

The State claims trial counsel argued contributory negligence, and that Judge Burton necessarily found that Larsen was the proximate cause of Skinners-Little’s death. State’s brief at 13.

While trial counsel did argue that King should have yielded and was speeding (T. 128-132), trial counsel failed to contest the State’s expert testimony that legally and technically, although not morally, a car has no duty to yield to another car in its way if the other car is legally in the wrong for being there (T. 97-100). Trial counsel never apprised the trial court of Utah law contradicting this testimony and establishing the duty of all drivers to maintain a proper lookout.<sup>3</sup> He also never mentioned Utah law recognizing that intersections and hill crests as hazards which normally may require driving under the posted speed limit,<sup>4</sup> of Utah law indicating that drivers are generally to pass in the left-hand lane, and are to pass on the right only when it is safe to do so,<sup>5</sup> or of

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<sup>3</sup> See Richards v. Palace Laundry Co., 186 P. 439, 442 (Utah 1919); Martin v. Sheffield, 189 P.2d 127, 130-131 (Utah 1948); Hughes v. Hooper, 431 P.2d 983, 983-84 (1967); Country Club Foods v. Barney, 352 P.2d 776, 777 (Utah 1960); Childs v. Gonda, 972 P.2d 425, 434 (Utah 1998).

<sup>4</sup> See Utah Code Ann. §41-6-46(1)(a) and (c).

<sup>5</sup> Compare Utah Code Ann. § 41-6-55 (indicating drivers are to pass in the left lane) with Utah Code Ann. §41-6-56 (stating conditions in which one may pass on the right).

Utah law forbidding drivers from passing within 100 feet of an intersection.<sup>6</sup>

While trial counsel did mention contributory negligence in trying to cross-examine the State's expert about whether or not King had any duty to yield (T. 97-99), in his summation, he did not argue that King was an intervening proximate cause, that Larsen's driving was not the proximate cause, or that Skinners-Little's death was not a foreseeable consequence of Larsen's driving. Rather, he conceded the Larsen was civilly negligent and argued that his negligence did not amount to criminal negligence (T. 126-132).

The trial court never expressly considered the viability of a contributory negligence theory in this context, stating only in response to trial counsel's argument that he should be able to inquire into King's duty to yield, "I think the law does recognize mitigation of your duties, so yea, I think it's a relevant question." (T. 99). In his final ruling, Judge Burton never addressed whether Larsen or King was the proximate cause of Skinners-Little's death, or whether her death was a foreseeable consequence of Larsen's driving.<sup>7</sup>

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<sup>6</sup> Utah Code Ann. §41-6-58 is interpreted as forbidding cars to pass within one hundred feet of an intersection. See Hathaway v. Marx, 439 P.2d 850, 850 (Utah 1968).

<sup>7</sup> He ruled,  
And obviously, the question upon which the whole case is focused and which is the most serious, of course, is the negligent homicide. A factor on that matter is, I think important to note, that Mr. J. Larsen notes that as the light turned green for Mr. Brett Larsen, that he waited a few moments, then he moved into the intersection. Mr. J. Larsen describes the turn as not being slow and not being fast, just a casual, normal turn, and I took it to mean that Mr. Brett Larsen was turning as if it were a clear intersection.

Mr. J. Larsen, sitting behind Mr. Brett Larsen, can see the other motor vehicle approaching the intersection, so it's clear that the vehicle was visible. And

The State cites State v. Busby, 131 P.2d 510 (Utah 1942), for the proposition that even if King was speeding, passed illegally and failed to maintain a proper lookout, this did not relieve Larsen of his duty to yield to oncoming traffic. State's brief at 15.

Larsen agrees that he had a duty to yield to oncoming traffic, but that fact does not resolve whether King's unlawful driving was the intervening proximate cause of Skinners-Little's death. While the State refuses to concede that there was any evidence of improper driving by King, State's brief at 14, the State has provided no citation to the record, and no factual argument to counter the evidence demonstrating that By undisputed evidence including Douglas King's own admissions, King was going above the speed

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finally, Deputy Stratford tells us that Mr. Brett Larsen's truck tire was moving at the time of the impact, indicating that he made no effort to stop.

Now, with those findings of fact, then we come to the standard that must be applied, which both sides have recited. Should Mr. Brett Larsen have been aware of a substantial and unjustifiable risk that he was taking or which might occur when he took that risk? And was this risk of such a nature and degree that his failure to perceive it constituted a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from Mr. Brett Larsen's standpoint?

And I have to say, though it's been ably argued and the facts presented, it's clear to me that this is a gross deviation from the standard of care that an ordinary person has to exercise. Were that not true, it would not be possible to drive a motor vehicle on any roadway that ever intersected with another roadway.

I mean, Mr. Brett Larsen's actions today, due to these facts, has to be a gross deviation. Essentially, he drove into the intersection, turned left, and made no perceptive view of the oncoming traffic. And if one were to do that, and it would just be a simple deviation or to be the normal procedure, it could not be tolerated in any way. So on the count criminal -- negligent homicide, I find the Defendant guilty based on the facts presented.

(T. 138-139).

limit (T. 21, 115, 71-72)<sup>8</sup> while approaching an intersection and at the crest of a hill (T. 113-115),<sup>9</sup> and came out of the left lane from behind a slower car and passed the car in the right-hand lane (T. 113),<sup>10</sup> while perhaps mildly distracted, without maintaining a proper lookout,<sup>11</sup> without insuring that it was safe to do so (T. 115-116, 118, 119),<sup>12</sup> and immediately prior to or while he was entering an intersection.<sup>13</sup> Larsen maintains that this evidence establishes that he was not the proximate cause of Skinners-Little's death.

See Larsen's opening brief at 14-16, discussing State v. Hallett, 619 P.2d 335 (Utah

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<sup>8</sup> The State's accident reconstructionist was unable to determine the speed of the Subaru because of insufficient data (T. 91).

Larsen's motion for a remand pursuant to Utah Rule of Appellate Procedure 23B and accompanying affidavit allege that Larsen's mother provided trial counsel with evidence that the combined speed of the cars involved in the accident was between 110 and 120 miles an hour. Larsen renews his motion for a remand, should the Court not otherwise reverse his conviction for negligent homicide.

<sup>9</sup> Utah law recognizes intersections and hill crests as hazards which normally may require driving under the posted speed limit. See Utah Code Ann. §41-6-46(1)(a) and (c).

<sup>10</sup> Utah drivers are generally to pass in the left-hand lane, and are to pass on the right only when it is safe to do so. Compare Utah Code Ann. § 41-6-55 (indicating drivers are to pass in the left lane) with Utah Code Ann. §41-6-56 (stating conditions in which one may pass on the right).

<sup>11</sup> The law recognizes the duty of all drivers to maintain a proper lookout. See Richards v. Palace Laundry Co., 186 P. 439, 442 (Utah 1919); Martin v. Sheffield, 189 P.2d 127, 130-131 (Utah 1948); Hughes v. Hooper, 431 P.2d 983, 983-84 (1967); Country Club Foods v. Barney, 352 P.2d 776, 777 (Utah 1960); Childs v. Gonda, 972 P.2d 425, 434 (Utah 1998).

<sup>12</sup> The law requires those passing on the right to do so only when it is safe. Compare Utah Code Ann. § 41-6-55 (indicating drivers are to pass in the left lane) with Utah Code Ann. §41-6-56 (stating conditions in which one may pass on the right).

<sup>13</sup> Utah Code Ann. §41-6-58 is interpreted as forbidding cars to pass within one hundred feet of an intersection. See Hathaway v. Marx, 439 P.2d 850, 850 (Utah 1968).

1980).

## B. Foreseeability

The State argues that Kara Skinners-Little's death was a foreseeable consequence of Larsen's driving, State's brief at 15-18, a position which was never articulated or even addressed by the trial court.

The State's entire foreseeability argument is premised on an unspoken assumption that Larsen failed to yield to a known hazard -- King's car. See State's brief at 15-18. The problem with the State's argument is that all of the evidence (T. 58, 61, 72, 92, 83), and the trial court's findings (T. 138-139), indicate that Larsen did not see King's car.

## C. Criminal Negligence

In arguing sufficiency of the evidence to sustain a finding of criminal negligence, the State implies that the trial court made numerous findings specific to the negligent homicide charge. The States' brief argues,

The trial court made specific factual findings that (1) Appellant intended to turn left at the intersection in question; (2) that he failed to yield to an oncoming vehicle which was so close as to constitute an immediate hazard; (3) that at the time of the collision Appellant was carrying an open container of an alcoholic beverage, the contents of which was partially removed, in his vehicle; (4) that Appellant was 21 years of age at the time of the collision; (5) that Appellant had consumed alcohol on that occasion. (T. 137-138). The trial court also found that the oncoming vehicle of Douglas King was visible, given that witness Henry Larsen testified to having seen it from some distance (T. 138). Lastly, the court found that Appellant had made no effort to stop prior to the collision, as indicated by the testimony that his tires were still moving after the collision. (T. 138).

State's brief at 19-20.



What this Court can easily confirm by reviewing the trial court's ruling is that all of the alcohol-related findings were made in reference to the charges of open container and possession of alcohol by a minor. See Larsen's opening brief addendum (containing T. 137-139).

Without fully quoting the trial court's ruling, the State claims in passing without any legal analysis that the trial court stated the legal standard for negligent homicide correctly. State's brief at 20.

The State has not addressed or refuted Larsen's contention that while the trial court essentially repeated the relevant statutory language at the outset of his ruling on the negligent homicide conviction (T. 138), review of his ruling demonstrates that his application of that standard was legally erroneous, and that he apparently believed that a finding of no gross negligence in this case was equivalent to a finding that Larsen's driving was within the ordinary course of care, or not negligent under the terms of simple negligence (T. 138-139). See Larsen's opening brief at 18-20. Larsen stands by this argument.

### III. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION FOR FAILURE TO YIELD.

The State claims that it has no burden to prove that Larsen acted with any level of intent in failing to yield, because “one who violates provisions of [the Motor Vehicle Code] is presumed to intend the natural consequences of his [or her] violation.” Greaves

v. State, 528 P.2d 805, 807 (Utah 1974).” State’s brief at 21 (brackets by the State).

The Court should not follow this argument, because it misreads Greaves. Greaves involved a constitutional vagueness challenge to the DUI statute in effect at the time, because it failed “to require either a specific intent, or an act which implies intent, to violate the statute,” because without a chemical test, a person could not tell that the level of his blood alcohol level. Id. at 806. In rejecting this contention, the Greaves court stated,

This statute is part of the Motor Vehicle Code, whose purpose is to govern the safety of the use and operation of motor vehicles. Inherent in its language is the legislative determination and declaration that the stated blood content of .10 percent of alcohol makes it dangerous for a person to operate or be in control of a vehicle. This is one of those situations where from the doing of the prohibited act one is presumed to intend its natural consequences; and it is the intentional doing of the act prohibited by law which constitutes the offense.

Id. at 807. It was from this context that the State redacted and rewrote its quote in its brief in this case.

Greaves may be read as standing for the common proposition that a person is assumed to intend the ordinary consequences of his actions, but certainly does not support the State’s assertion here, that the State has no duty to establish *mens rea* in traffic cases. Utah Law always requires the State to prove *mens rea* to obtain a criminal conviction unless the offense it seeks to convict on is one of strict liability. See e.g. Utah

Code Ann. §76-2-102.<sup>14</sup> This statutory maxim applies in traffic cases. See e.g. Charvos v. Cottrell, 361 P.2d 516, 519 (Utah 1961)(“Before the duty of a driver to yield the right of way arises he must be in a situation whereby he is either aware of the presence of a pedestrian within the crosswalk or should have, in the exercise of reasonable care, become aware of the pedestrian's presence in time to yield the right of way.”).

#### IV.

#### THIS COURT SHOULD ADDRESS THE MERITS OF THE ISSUES UNDER THE PLAIN ERROR AND/OR INEFFECTIVE ASSISTANCE OF COUNSEL DOCTRINES.

It does not appear that the State is arguing waiver as a basis for rejecting any of Larsen’s claims on appeal, and thus, it appears that the Court may proceed to address the merits of the issues without regard to the plain error and ineffective assistance of counsel doctrines.

The State claims that there was no plain error and no ineffective assistance of counsel, because there were no errors which occurred at trial. See State’s brief at 21-25.

Larsen does not dispute the legal standards cited by the State on the ineffective assistance of counsel and plain error points, but does contend that errors occurred in his

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<sup>14</sup> Utah Code Ann. §76-2-102 provides,

Every offense not involving strict liability shall require a culpable mental state, and when the definition of the offense does not specify a culpable mental state and the offense does not involve strict liability, intent, knowledge, or recklessness shall suffice to establish criminal responsibility. An offense shall involve strict liability if the statute defining the offense clearly indicates a legislative purpose to impose criminal responsibility for commission of the conduct prohibited by the statute without requiring proof of any culpable mental state.

trial which amounted to plain error and ineffective assistance. See Larsen's opening brief at 20-24, 31-34.

### CONCLUSION

Based on the analysis provided in this brief, and in Larsen's opening brief, the Court should reverse the convictions for negligent homicide and failure to yield, and order those two charges dismissed for insufficient evidence.

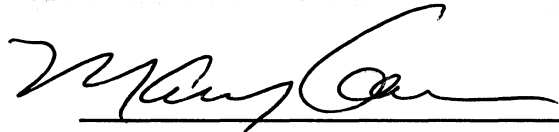
Dated this 23 day of November, 1999.

A handwritten signature in black ink, appearing to read "Manny Garcia", is written over a horizontal line.

Manny Garcia  
Counsel for Mr. Larsen

**CERTIFICATE OF MAILING/DELIVERY**

I, Manny Garcia, hereby certify that I have caused to be hand-delivered/mailed,  
first class postage pre-paid, two true and correct copies of the foregoing to Sirena  
Wissler, Deputy District Attorney, 2001 South State, Suite 3700, Salt Lake City, Utah  
84190, this 23 day of Nov, 1999.

  
\_\_\_\_\_  
MANNY GARCIA  
Attorney for Mr. Larsen

I delivered/mailed the foregoing accordingly this \_\_\_\_ day of \_\_\_\_, 1999.

\_\_\_\_\_